MALAYAN FINANCE CORP. BHD.

v.

NKM CREDIT SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[SUIT NO. C 3232 OF 1983]
23 APRIL 1985

CIVIL PROCEDURE: *Order 14 application dismissed - Appeal - Preliminary objections to the appeal - Filing of O. 14 - Aplications out of time.*

Judgment in default of appearance had been entered against the 1st defendants. The plaintiffs took out O. 14 application against the 2nd, 3rd, 4th and 5th defendants but this was dismissed with costs. The plaintiffs appealed against the dismissal.

The solicitors for the 3rd, 4th and 5th defendants took preliminary objections against the appeal. The second objection was quickly disposed of and the rest of the case turned on the first objection, that is, the delay in filing the O. 14 application.

Held:

[1] In the context of the present situation even if the summons is filed immediately after appearance is entered, it is unlikely that it would be issued within the 14 days that the defendant normally has to deliver his defence; the onus of justifying slight delays should be very light indeed and could be discharged informally and from the Bar.

[2] There was nothing objectionable in a plaintiff waiting to see whether he could enter judgment in default of defence before filing the O. 14 application.

[3] The delay in filing the O. 14 application as against the 3rd and 4th defendants was justified. In the circumstances, it seemed pointless for the plaintiffs to have moved against the other defendants under O. 14 and therefore the delay in filing O. 14 proceedings against the other defendants was also, in all the circumstances, justified.

[Preliminary objections rejected. Hearing of appeal adjourned to 14th May 1985.]

Cases referred to:

Comptroller-General of Inland Revenue Malaysia v. Weng Lok Mining Co. Ltd. [1969] 2 MLJ 98
McLardy v. Slateum [1890] 24 QBD 504
Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267

For the plaintiffs/appellants - K. Anantham; Tetuan Skrine & Co.
For the 3rd and 4th defendants - P.S. Ranjan; Tetuan Ng Ek Teong & Partners
For the 5th defendants - Harcharan Singh Sidhu; Tetuan Weng Kwai & Co.

[**Editor's Note:** The notice of appeal was filed on 3 April 1985 under reference S.Ct.C.A. 125/85]

JUDGMENT

VC George J:
[On encl. (18)]

Appearances to the writ were entered by the fourth defendants on 4 April 1984, by the 3rd defendant on 10 April 1984, by the second defendant on 12 April 1984 and by the fifth defendants on 16 April 1984. The third and fourth defendants jointly filed a defence on 30 April 1984. The fifth defendants' defence was filed on 2 May 1984 and the second defendant's on 3 May 1984.

It was only on the 31 May 1984 that the plaintiffs took out their O. 14 application as against the second, third, fourth and fifth defendants. Judgment in default of appearance had been earlier entered as against the first defendants.

The date for the hearing of the application that was allotted when the summons was issued was the 6 December 1984. The learned Senior Assistant Registrar who heard the application dismissed it with costs. The plaintiffs appealed.

When the appeal was called on, the hearing of the appeal as against the second defendant on an application made on his behalf was adjourned to a later date. In respect of the appeal as against the others, Counsel for the third, fourth and fifth defendants took what was referred to as preliminary objections, firstly on the ground that the O. 14 application was filed out of time and secondly that in the affidavit in support of the application the amount said to be due and owing was stated to be RM65,403.89 whereas the amount claimed by the statement of claim was RM66,303.89.

As to the latter of the two complaints the deponent of the said affidavit has, in his affidavit effectively explained the discrepancy. In my view with the explanation having been given nothing turns on the discrepancy. It certainly cannot be the object of a preliminary objection.

The explanation given for filing the O. 14 application only on 31 May 1984 is given by the affidavit of Encik Anantham Kasinather, the solicitor having the conduct of the matter for the plaintiffs. He explained that after appearances were entered for the third and fourth defendants, their solicitors had asked the plaintiff's solicitors for certain documents pertaining to the claim. These were supplied on 17 April 1984. It would appear that the plaintiffs' solicitors awaited the reaction of the third and fourth defendants' solicitors after supply of the documents and that it was only when there was no reaction or suitable reaction from them that it was decided to move the Court under O. 14. Thereafter time had to be and was spent settling the terms of the affidavit in support of the application. It was contended for the plaintiffs that in the context of the Court not being able to allot early dates for the hearing of O. 14 applications (as has been seen the date allotted on filing of the application on 31 May 1984 was 6 December 1984) filing the application a couple of months after appearances were entered was not unreasonable. Encik Anantham Kasinather stated that it was the practice for the solicitors for a plaintiff who had supplied documents in support of the plaintiff's claim to the defendant's solicitors to give those solicitors time to take instructions on them before proceeding to take the next step which could be O. 14 proceedings. It was suggested that that was a sensible approach to take to avoid protracted litigation particularly where after perusal of the documents the defendant may be amenable to a settlement of the claim.

In *Comptroller-General of Inland Revenue Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 MLJ 98 Raja Azlan Shah J (as he then was) held that a 3 month delay in filing O. 14 proceedings in the circumstances of an action brought by the Inland Revenue Department was not inordinate. The explanation for the delay in that case was given from the Bar. At line H left column at p. 99 of the report the learned Judge stated,

> Counsel for the plaintiff contended that the delay was reasonable and preferred the following reasons, namely, that the Department of Inland Revenue is a very large department, heavily loaded with work and shorthanded; and the situation was aggravated by the intervening Puasa hours, Court vacation and festivities, namely Hari Raya Puasa, Christmas and New Year holidays. In the light of what has been stated, I am disposed to hold that the delay of a lapse of 3 months in the circumstances of the case is not inordinate and does not warrant a dismissal of the application.

For the defendants, *McLardy v. Slateum* [1890] 24 QBD 504 was cited. The case teaches that the view that the plaintiff was bound to make his application for summary judgment before the defendant had put in any statement of defence, is not correct. Pollock B. in delivering the judgment of the Divisional Court said,

> ... The view taken by other judges, and by the masters, is that the intention of O. XIV, r. 1, was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under O. XIV right and proper. We think that this is the proper construction of the rule.

The learned Baron went on to say that,

> If a plaintiff makes his application after the ordinary time, the onus is on him to show that the delay is justifiable under the special circumstances of the case.

In *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267, Abdoolcader J (as he then was) accepted Pollock B.'s view on the matter, as I, with respect, also do. Pollock B. as has been seen from the passage quoted from his judgment did not find anything objectionable to a plaintiff relying on what is disclosed in the statement of defence to be motivated to move under O. 14. With respect, neither do I. I would add that in the context of the situation that obtains that even if the summons is filed immediately after appearance is entered it is unlikely that it would be issued within the 14 days that the defendant normally has to deliver his defence, the onus of justifying slight delays should be very light indeed and as happened in *Comptroller-General of Inland Revenue Malaysia v. Weng Lok Mining Co. Ltd.* (*supra*) could be discharged informally and from the Bar.

An advantage that the plaintiff has in waiting for the time allowed for defence to be delivered before filing the O. 14 application is that in the event the statement of defence is not delivered he could proceed to enter default judgment which he would not have been able to do had he filed the O. 14 proceedings earlier as the rules provide that where O. 14 proceedings have been commenced the defendant need not deliver his defence until after the order dismissing the application. I find nothing objectionable in a plaintiff waiting to see whether he could enter judgment in default of defence before filing the O. 14 application.

In all the circumstances I was satisfied that the delay in filing the O. 14 application as against the third and fourth defendants was justified. In the circumstances it seemed to me pointless for the plaintiffs to have moved against the other defendants under O. 14 and therefore the delay in filing O. 14 proceedings against the other defendants was also, in all the circumstances, justified. Accordingly, the preliminary objections taken were rejected. As the Court was short of time, the hearing of the appeal was adjourned to 14 May 1985.

Also found at [1986] 1 CLJ 89